NO. 43112-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PETER TVEDT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 11-1-00883-7

BRIEF OF RESPONDENT

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1. In light of the Supreme Court opinion of ***State v. Gresham***, did the court improperly admit evidence of defendant's alleged sexual assault against the victim's step-mother under RCW 10.58.090?

2. Was the admission of evidence under RCW 10.58.090 harmless where, within reasonable probabilities, the outcome of the trial was not materially affected?

B. STATEMENT OF THE CASE.

1. Procedure

On February 25, 2011, the State charged Peter Tvedt, hereinafter "defendant," with one count of rape of a child in the second degree and one count of intimidating a witness. CP 1-2. The charges arose out of allegations that defendant raped his granddaughter, H.P.[1] CP 3-4.

On December 5, 2011, the parties proceeded to jury trial before the Honorable Elizabeth P. Martin. RP 1. Prior to presenting testimony, the State moved to admit allegations that defendant attempted to rape his daughter, C.P., when she was 19 years old. RP 12. The court heard

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[1] As the victim in this case is a minor, the State identifies her by her initials. Also, the victim, her father and her step-mother share the same last name. State will identify those witnesses by their initials in order to ensure the victim's privacy.

testimony from C.P. regarding the allegation before ruling that the evidence was admissible under RCW 10.58.090[2], but inadmissible as a common scheme or plan under ER 404(b). *See* RP 58-69, 101-02. The court found that the evidence was necessary and more probative than prejudicial for purposes of RCW 10.58.090, but there was not enough similarity between the past incident and current crime to be a common scheme or plan and that the probative value was outweighed by the prejudice for purposes of ER 404(b). RP 102-04.

On December 14, 2011, the jury found defendant guilty as charged. CP 101, 102; RP 632.

On January 20, 2012, defendant filed a motion for arrest of judgment based on the Washington Supreme Court's ruling in ***State v. Gresham***, 173 Wn.2d 405, 269 P.3d 207 (2012). CP 103-29; RP 638. On February 10, 2012, the trial court denied the motion and proceeded to sentencing. CP 157; RP 644.

The court sentenced defendant to a high-end, standard-range sentence of 114 months[3] to life on Count I and 20 months on Count II, to run concurrent. CP 136-53; RP 654-55.

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[2] Approximately one month after the court made its ruling, the Supreme Court declared RCW 10.58.090 unconstitutional. *See* ***State v. Gresham***, 173 Wn.2d 405, 269 P.3d 207 (2012).

[3] Defendant had an offender score of one, giving him a standard range of 86-144 months to life on the second degree rape of a child charge, and 15-20 months on the intimidation of a witness charge. CP 136-53.

Defendant filed a timely notice of appeal. CP 158-79. The State filed a timely notice of cross-appeal. CP 183-84.

2. Facts

In January and February 2011, defendant was living with his daughter, C.P. and her family while in the process of moving back to the State of Washington following a divorce. RP 118, 237. C.P.'s family consisted of her husband, J.P., and his daughter, H.P. RP 234. During this time, defendant slept on a couch in an upstairs living room, which was not the same room that the family used to watch television. RP 118-20, 236. On February 21, 2011, thirteen-year-old H.P. had fallen asleep on the couch in the family room, as she did not have to get up early for school the following day. RP 194. Just before 6:20 the following morning, she awoke to find defendant "in her ear." RP 194, 199-200. Defendant told her "I'm gonna fuck you, and you're not going to scream." RP 195. H.P. screamed for her father, but defendant told her that her parents were at work. RP 195.

H.P. begged defendant not to rape her and assured him she would not tell anyone about the incident. RP 196. Defendant then had a change of heart and told H.P. to "suck [his] cock," and unzipped his pants. RP 196. When H.P. touched his penis, she noticed it was wet. RP 197. Defendant told her, "it's come, get over it." RP 197. When H.P. told defendant that she did not understand what he wanted, defendant took two

of her fingers into his mouth and performed a back and forth motion with his head. RP 197. Defendant told her again to "suck his cock." RP 198.

H.P. performed as defendant ordered. RP 198. When she finished, defendant told her not to tell anyone. RP 198. H.P. ran to the bathroom, where she noticed that she had "white stuff" all over her shirt. RP 198. H.P. did not remember if she swallowed anything, but remembered having a need to spit when she got to the bathroom. RP 226.

While H.P. was in the bathroom, defendant knocked on the door and demanded to be let in. RP 201. Defendant told H.P. that he would beat her if she told anyone and that, if he went to jail, he would "beat the shit" out of her. RP 201. Defendant then told H.P. to go get ready for school. RP 202.

H.P. went to her room and got dressed. RP 202. Despite not having school that day, she pretended she did in order to have an excuse to leave the house and avoid being alone with defendant any longer. RP 202. When she came out of her bedroom, defendant began apologizing to her. RP 204. Defendant started to cry, or pretended to cry, and told H.P. that sometimes he gets "a little crazy," he did not know why he did it, and offered to leave the house. RP 204. He also told her that he understood if she wanted to tell someone what had happened. RP 205. Defendant's statements made H.P. feel that he was actually sorry for what had happened. RP 205. H.P. told defendant she wanted him to leave. RP 205.

H.P. left the house briefly and snuck back in while defendant was in the shower. RP 206. She locked herself in her room and watched defendant pack his belongings into his car. RP 206. After defendant drove away, H.P. considered what she should do. RP 207. She called her aunt, Joanna Naylor, who came to H.P.'s aid. RP 207-08. H.P. did not want to tell her father what had happened, because she thought J.P. would "do something stupid" to defendant. RP 209.

H.P. never took anything that belonged to defendant. RP 214. She also did not notice any wet towels left in the bathroom. RP 214.

Approximately eleven years earlier, H.P.'s step-mother, C.P., was nineteen-years-old and still living with defendant. RP 246. C.P. was home alone with defendant one day, watching television in her parents' bedroom. RP 246. Defendant came out of the shower wearing only a towel, and C.P. got up to leave the room. RP 246. Before she could leave, defendant came to sit next to her and demanded she give him a "blow job." RP 246. When C.P. refused, defendant attempted to force her head into his lap. RP 246. C.P. struggled and was able to get away from defendant and lock herself in her room. RP 246. Defendant came to her room and apologized, citing problems with C.P.'s mother. RP 247. Defendant begged C.P. not to tell her mother and C.P. told defendant that everything was fine. RP 247-48. C.P. never discussed the incident with defendant again, but she did tell her best friend, Joanna Naylor, a couple of days afterward. RP 248.

In 2011, C.P. allowed defendant to stay in her house over J.P.'s objections because she wanted to believe that defendant was a better person, though she did have concerns. RP 249-50. According to C.P., H.P. had minimal contact with defendant throughout his visit and the incident happened the only time he was ever left alone with H.P. RP 250-51. Sometime during the morning of February 22, 2011, defendant left her a voice mail stating that he could no longer stay in the house because he "felt cooped up." RP 243. Defendant said he did not know where he was going, but would call her in a couple of days. RP 243-44.

Ms. Naylor is J.P.'s sister. RP 264. She is very close to J.P.'s family, including H.P. RP 265. When she heard defendant was coming to stay with her brother, she told H.P. about the incident that had happened between defendant and C.P. RP 272.

When Ms. Naylor spoke to H.P. on February 22, 2011, H.P. was hysterical. RP 266. H.P. would not tell her what was wrong, but repeatedly asked her to come to H.P.'s house. RP 267. Ms. Naylor tried to guess what was wrong with H.P. several times, and finally thought to ask if it involved defendant. RP 269. She asked H.P. where defendant was at that time, and H.P. started crying harder while repeating, "it's just history." RP 271. When Ms. Naylor arrived at H.P.'s house, H.P. told her what had happened. RP 276-77. Ms. Naylor took H.P.'s shirt and placed it in a Ziploc bag for the police. RP 280.

Later that afternoon, H.P. was taken to the Child Advocacy Center where she was examined by Joanne Mettler. RP 428. She took oral swabs of H.P.'s mouth sometime after 2:00 in the afternoon and responded to H.P.'s concerns regarding sexually transmitted diseases. RP 432-34.

William Dean, a forensic DNA analyst with the Washington State Crime Lab received H.P.'s shirt, her oral swab, and a reference oral swab from defendant. RP 385. On his first test of H.P.'s oral swab, he received a weak positive result for semen, but subsequent testing was negative. RP 388, 398. Semen can survive in the oral cavity for approximately six hours, less if the person ate or drank or spit. RP 388.

Mr. Dean also tested the stains on H.P.'s shirt. RP 393. The stains tested positive for semen and the DNA matched defendant's reference sample. RP 392-94. The probability of selecting an individual at random who matched the sample was 870 quadrillion. RP 393-94.

Defendant testified on his own behalf. RP 449. Defendant claimed that, on February 22, 2011, he woke up at 5:30 a.m. and got out of bed at 5:55 a.m. RP 452. After having a cigarette, defendant stated he masturbated while in the shower. RP 453. According to defendant, when he exited the shower, he noticed some "fluid or seepage," so he used a brown hand towel located on the left-hand side of the counter to clean himself off before using a regular towel to dry his body. RP 454. Defendant claimed he returned the hand towel to the left-hand side of the counter when he was finished with it. RP 462.

At 6:15 a.m., he went back to bed. RP 455. Seven minutes later, he felt something brush against his hand. RP 455-56. Defendant testified that he opened his eyes to see H.P. taking $100.00 from his suitcase. RP 456. Defendant claimed he confronted H.P., who started crying. RP 456. H.P. begged him not tell C.P. and went to the bathroom to "dry her tears." RP 458. According to defendant, he went to apologize to H.P. because he realized that by yelling at H.P. for stealing, he "overreacted." RP 458. Defendant claimed he saw H.P. standing in the bathroom with the brown hand towel in her hand. RP 458.

Defendant then decided to move out. RP 459. As he was packing his belongings, he went into the bathroom and noticed the hand towel was on the right side of the counter, rather than the left and that it was "ruffled." RP 454, 461. As he knew the towel was dirty, he grabbed it and threw it on the passenger seat of his car. RP 454, 462.

Defendant finished packing at 7:30 a.m. RP 461. He called C.P. to tell her he was moving, but claimed he had decided not to tell her about H.P.'s conduct. RP 459-60. Defendant never told C.P. that he caught H.P. stealing from him. RP 470.

Defendant testified that he never had inappropriate contact with C.P. and had first heard of C.P.'s allegations of misconduct against her on February 26, 2011. RP 463, 468, 475.

On August 12, 2011, Susan Watts, a private investigator hired by the defense, retrieved a brown hand towel from the passenger seat of

defendant's car where it was parked at a residence owned by Diane Walley. RP 487. Ms. Walley testified that defendant's car had been parked at her house since May, 2011. RP 571.

The brown hand towel had several stains, one of which tested positive for semen. RP 540-50. Kerstin Glein, the technician who tested the towel for the defense, testified that she did not do a DNA test to determine whether or not it was defendant's semen. RP 555. She did not examine or test H.P.'s shirt. RP 562.

C. ARGUMENT.

1. BECAUSE THE SUPREME COURT HAS HELD THAT RCW 10.58.090 IS UNCONSTITUTIONAL, IT WAS NOT A PROPER BASIS FOR THE TRIAL COURT TO ADMIT EVIDENCE OF DEFENDANT'S ALLEGED ASSAULT ON C.P.

Defendant claims that testimony regarding his alleged attack against C.P. was erroneously admitted under RCW 10.58.090. In ***State v. Gresham***, 173 Wn.2d 405, 432, 269 P.3d 207 (2012), our Supreme Court held that RCW 10.58.090 is unconstitutional because it violates the separation of powers.

Gresham is binding on this court. Because RCW 10.58.090 is unconstitutional, it was not a proper basis on which to admit C.P.'s testimony. However, as argued more fully in the section relating to the State's brief on cross-appeal, the evidence was properly admissible under

ER 404(b). Moreover, any error in the admission of the evidence here was harmless.

2. ANY ERROR IN ADMITTING EVIDENCE OF DEFENDANT'S ASSAULT ON C.P. WAS HARMLESS BECAUSE, WITHIN REASONAL PROBABILITIES, THE OUTCOME OF THE TRIAL WOULD NOT HAVE BEEN MATERIALLY AFFECTED.

The harmless error standard for admission of evidence under RCW 10.58.090 is the lesser standard of nonconstitutional error. ***Gresham***, 173 Wn.2d at 433. The question, then, is whether, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." ***Gresham***, 173 Wn.2d at 433 (internal quotations omitted).

In ***Gresham***, the Court concluded that the admission of the defendant's prior conviction was not harmless. The Court noted that much of the testimony at trial was predicated on the fact of his prior conviction, including all of one witness's testimony and much of the victim's parents' testimony. All that remained, absent the prior conviction, was the victim's testimony[4] and her parents' corroboration that the defendant had the opportunity to molest the victim. While the Court observed that such

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[4] The State disagrees with the Supreme Court's statement that there were no eyewitnesses to the alleged incidents of molestation. *See* ***Gresham***, 173 Wn.2d at 433. The victim was an eyewitness. It appears that the Court meant "eyewitness" to be third-party witnesses to the incidents.

evidence is sufficient to support a conviction, it was insufficient to determine that the jury's verdict had not been materially affected by the evidence of the prior conviction. ***Gresham***, 173 Wn.2d at 433-34.

Here, the admission of C.P.'s allegations of defendant's actions against her was harmless. Unlike in ***Gresham***, where the remaining evidence consisted solely of the victim's testimony, here there was overwhelming evidence of defendant's guilt. H.P. testified that defendant forced her to perform oral sex. RP 195-98. She did not recall swallowing any ejaculate, but noticed afterwards that her shirt was covered in semen. RP 198, 226. The DNA recovered from the semen stains on her shirt positively identified defendant as the donor. RP 392-94. An oral swab, taken from H.P. more than six hours after the incident, initially indicated a positive presence of semen, but subsequent tests were negative for either spermazoa or P30, the protein found in large quantities of semen. RP 388, 398; 432-34.

Moreover, the jury had the opportunity to assess defendant's credibility. Defendant told a story of a 13-year-old girl who recognized a small amount of "fluid or seepage" on a hand towel left on the counter of the bathroom as defendant's semen; smeared it over the front of her shirt; and used it in support of a fabricated story of sexual misconduct all because defendant caught her stealing money from his suitcase exactly seven minutes after he went back to bed after showering. RP 454-56. Clearly, the jury did not find defendant credible.

Because the outcome of the trial, within reasonable probability, was not affected by the evidence of defendant's action against C.P., any error in admitting the evidence under RCW 10.58.090 was harmless.

PART II

STATE'S CROSS APPEAL

D. CROSS APPELLANT'S ASSIGNMENTS OF ERROR.

1. The trial court abused its discretion when it excluded evidence of defendant's sexual assault against the victim's step-mother under ER 404(b).

E. ISSUES PERTAINING TO THE CROSS-APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court accorded the proper weight to the similarities between the events when it found that the two acts were not admissible as part of a common scheme or plan?

F. ARGUMENT.

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED EVIDENCE OF DEFENDANT'S ALLEGED ASSAULT ON C.P. UNDER ER 404(b).

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ***State v. DeVincentis***, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of a prior act is admissible to show a common scheme or plan under ER 404(b) only "(1) if the State can show the prior acts by a preponderance of the evidence, (2) the evidence is admitted for the purpose of showing a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial." ***State v. Kennealy***, 151 Wn. App. 861, 886, 214 P.3d 200 (2009).

There are two types of evidence admissible to show a common scheme or plan under ER 404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. ***DeVincentis***, 150 Wn.2d at 19. The instant case deals with the second type of common scheme or plan, a single plan followed to commit separate but very similar crimes. Such a common scheme or plan "may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. ***State v. Lough***, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Evidence of such a plan "must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as

caused by a general plan of which the charged crime and the prior misconduct are individual manifestations." ***DeVincentis***, 150 Wn.2d at 19 (quoting ***Lough***, 125 Wn.2d at 860). But such common features need not show a unique method of committing the crime. ***DeVincentis***, 150 Wn.2d at 20–21.

In ***Lough***, our Supreme Court upheld the admission of prior rapes to establish that Lough drugged and raped the complaining witness. 125 Wn.2d at 861. In each prior instance, Lough drugged the victim and raped her. 125 Wn.2d at 849–51. Lough followed this plan to commit rape in slightly different ways each time - for instance, Lough met the complaining witness at a class he was teaching and later came to her home where he drugged her drink. 125 Wn.2d at 849–50. In another instance, Lough told the victim she looked tired and needed an iron supplement, and thus got her to drink some drugged orange juice. 125 Wn.2d at 850. In yet another instance, Lough gave the victim pain medication for a broken arm that put her to sleep. 125 Wn.2d at 851. Our Supreme Court determined that Lough's "history of drugging women, with whom he had a personal relationship, in order to rape them while they were unconscious or confused and disoriented evidences a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual intercourse." 125 Wn.2d at 861.

Our Supreme Court likewise upheld the admission of evidence of a prior act of child molestation to show a common scheme or plan to

commit the same in ***DeVincentis***, 150 Wn.2d at 22–24. In both situations, the victims were girls between 10 and 13 years old. 150 Wn.2d at 22. DeVincentis used a similar method to get to know the victims, using his daughter to get to know his daughter's friend, and using a neighbor girl to get to know the neighbor girl's friend. 150 Wn.2d at 13, 15, 22. Also in both circumstances, he wore unusual underwear to get the victims used to his near-nudity. 150 Wn.2d at 22. Moreover, he asked both victims for massages in a secluded spot in his home, having them perform the same sex act on him. 150 Wn.2d at 22. ***DeVincentis***, 150 Wn.2d at 19–21 (holding that evidence of prior misconduct was relevant to show that defendant had previously victimized another girl in a markedly similar way under similar circumstances despite the intervening 15 years between the two sexual abuse incidents).

In ***State v. Sexsmith***, 138 Wn. App. 497, 505, 157 P.3d 901 (2007), Division Three of the Court of Appeals also upheld the admission of evidence of prior acts of child molestation under ER 404(b) to show a common scheme or plan. There, Sexsmith was in a position of authority over both victims, the victims were the same age when Sexsmith molested them, and Sexsmith isolated the victims when he molested them. 138 Wn. App. at 505. He further forced both victims to take nude photographs, to watch pornography, and to fondle him. 138 Wn. App. at 505.

Furthermore, in ***Gresham***, our Supreme Court upheld the admission of prior acts of child molestation to show a common scheme or

plan when in each instance, "Scherner took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals." 173 Wn.2d at 422. The court held that differences between the crimes, such as the presence or absence of oral sex and the fact that only some of the prior acts occurred in Scherner's home, did not render the decision to admit the evidence an abuse of discretion. 173 Wn.2d at 423.

The above cases show that courts have not limited the common scheme or plan exception to ER 404(b) to circumstances which were exactly alike. Here, the trial court abused its discretion when undervalued the probative nature of the evidence by focusing on minor differences between the two acts. The court found there was no common scheme or plan because the passage of time was too great (contrary to ***DeVincentis***), there were only two incidents (contrary to ***Sexsmith***), and there was no threat made to C.P. (contrary to ***Lough***). *See* RP 102. As a result, the court found that the evidence was substantially more prejudicial than probative. The trial court's reasoning was based on untenable grounds as it focused solely on minute differences between the acts, rather than considering the major similarities. When viewed in light of the above-referenced authority, defendant's misconduct toward C.P. was markedly similar to his misconduct toward H.P.

Evidence of defendant's sexual assault against C.P. was admissible under ER 404(b) as evidence of a common scheme or plan because the

evidence showed a single plan to commit separate but very similar crimes. Defendant demanded oral sex from both C.P. and H.P. RP 196, 246. C.P. and H.P. were both teenagers related to defendant. Both girls were alone in the house with defendant when the misconduct occurred. RP 195, 246. Both acts involved coercion by defendant; by physical force in the act against C.P. when she refused him and by threats of physical force afterwards against H.P. RP 201, 246. Defendant also attempted to manipulate each victim by crying, apologizing, and blaming his behavior on forces beyond his control in order to make both girls feel sorry for him. *See* RP 205, 247-48.

On balance, defendant's acts against C.P. and H.P. are "markedly similar acts of misconduct against similar victims under similar circumstances." ***Lough***, 125 Wn.2 at 852. This case is largely analogous to ***Sexsmith***, where the defendant there had the same relationship with both victims, the victims were of similar ages, the defendant isolated the victims, and the defendant had the victims perform similar sex acts on him. 138 Wn. App. at 505. Similarly here, defendant had the same relationship as a relative of both victims, the victims were both teenage girls, and defendant demanded oral sex from both while he was alone in the house with them. Also, both involved the defendant's attempts to apologize and manipulate his victims into pitying him.

The instant case is also analogous to ***Lough***, where the defendant used a common plan to drug women with whom he had a personal

relationship, although his method of getting the women to take the drug differed from crime to crime. 125 Wn.2d at 849–51, 861. Although defendant's use of force in one instance and threat of force in the other were different, both involved defendant's attempts to forcibly coerce the victims into compliance.

These common features show "that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." ***DeVincentis***, 150 Wn.2d at 19 (*quoting* ***Lough***, 125 Wn.2d at 860). The trial court's reasons for excluding the evidence were untenable and were an abuse of discretion.

G. CONCLUSION.

While the admission of defendant's sexual assault against C.P. was not admissible under RCW 10.58.090, it should have been admitted under

ER 404(b). Admission of the evidence was, at most, harmless error and the State respectfully requests this court to affirm defendant's convictions.

DATED: October 16, 2012

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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